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**Mayor Mary Clare Higgins and Conservation Commission**

**Chapter 24 and 25**

Amend the Northampton Wetlands Ordinance to improve clarity, public notice, and protection of vernal pool, codify and existing policies into the ordinance, and increase non-criminal disposition for repeat offenders

*{Revise sections as shown. No other changes to existing sections of the ordinance not shown.}*

**Section 24-1. Purpose**

*{These proposed changes are designed to clarify the purpose of Northampton's local wetlands ordinance. They do not create any new standards but are designed to help the reader understand the ordinance better.}*

The purpose of this ordinance is to maintain the quality of surface water, the quality and level of the ground water table and water recharge areas for existing, or potential water supplies; to protect the public health and safety; to protect persons and property against the hazards of flood water inundation; to protect the community against the costs which may be incurred when unsuitable development occurs in wetland resource areas; and to provide for the reasonable protection and conservation of certain irreplaceable natural features, resources and amenities for the benefit and welfare of the present and future inhabitants of the City of Northampton.

Accordingly, The purpose of this ordinance is to protect the wetlands, related water resources, and adjoining land areas in the City of Northampton by prior review and control of activities likely to have a significant or cumulative effect upon resource area wetland values, including but not limited to the following: public water supply, private water supply, groundwater, fisheries, wildlife, wildlife habitat, rare species habitat including rare plant species, recreation, agriculture, aesthetic values, flood control, erosion and sedimentation control, storm damage prevention, water quality, and prevention of water pollution; these values are to be known collectively as the "resource area wetland values protected by this ordinance". This ordinance supplements the Wetlands Protection

Act, and is intended to utilize the Home Rule authority of this municipality to protect additional resource areas, for additional values, with additional standards and procedures stricter than those of the Wetlands Protection Act (G.L. Ch. 131 §40) and Regulations thereunder (310 CMR 10.00), subject, however, to the rights and benefits accorded to agricultural uses and structures of all kinds under the laws of the Commonwealth.

## **Section 24-2. Jurisdiction**

*{Insert new paragraph g. No other changes to section}*

g. Vernal Pools and the vernal pool resource area shown in the table below. (See also definition.)

<u>Zoning District</u>	<u>Vernal Pool Resource Area Size</u>
<u>Central Business, General Business, Neighborhood Business, General Industrial, Special Industrial, Planned Village, Medical, Urban Residential-B and Urban Residential-C.</u>	<u>Vernal Pool and areas within 100 feet of the vernal pool, except as noted in this table below.</u>
<u>Non-residential uses only in the Business Park District.</u>	<u>Vernal Pool and areas within 100 feet of the vernal pool</u>
<u>All areas in the Water Supply Protection overlay which were zoned residential as of 1/1/2006.</u>	<u>Vernal Pool and areas within 200 feet of the vernal pool</u>
<u>All other areas not shown above.</u>	<u>Vernal Pool and areas within 200 feet of the vernal pool</u>

## **Section 24-5. Public Notice and Hearings**

*{The proposed changes are designed to provide better notice to abutters of applications, clarify the process, and reflect changes in the state wetlands protection act regulations, to include a notice of resource area delineation}*

An application for any wetland permit (Notice of Intent, or a request for determination, or resource area delineation) shall be hand delivered or sent by certified mail, return receipt, to the Conservation Commission, care of the Northampton Office of Planning and Development. Said applicant and shall, ~~within 48 hours,~~ give written notice to the owner if other than the applicant and to all abutters at their mailing addresses shown on the most recent applicable tax list of the assessors, including owners of land directly opposite on any public or private street or way, and other property owners within 100 feet of the property line of the applicant, including any in another municipality or across a body of water. The notice to abutters shall state where copies of the application or request may be examined and obtained by abutters and shall state where information on the date and time of the public hearing may be obtained. An affidavit of the person providing such notice, with a copy of the notice mailed or delivered, shall be filed with the Commission as part of the application or request for determination.

~~After the application/request is received, the applicant shall place a sign provided by the Conservation Commission facing a public right of way and visible from the right of way at the edge of the property upon which the permit or request is being made. Said sign shall notify the public that an application or request is pending on the property. Said sign shall be posted at least~~

~~five (5) working days before the first public hearing on the application or request.~~

~~A signed statement of the person posting said sign stating that the required sign was provided shall be filed with the Commission prior to the public hearing.~~

The Commission shall conduct a public hearing on any application, Abbreviated Notice of Resource Area Delineation (ANRAD), or request for determination. Notice of said hearing shall be published in a newspaper of general circulation in the City at least five (5) working days prior to said hearing. The published notice, which shall be prepared by the Commission, shall contain the following information: the date, time, and place of the hearing; the location of the property affected; the name of the applicant; and the action requested from the Commission. The Commission shall deliver the notice to the newspaper.

The Commission shall commence the public hearing within twenty-eight (28) days from receipt of a completed application ~~or request for determination~~ (one which shows all the information, based on a staff determination, necessary to make a decision), unless the applicant extends the ~~twenty-eight (28) day~~ time period by a written waiver.

The Commission shall have authority to continue the hearing to a date ~~and time certain~~ announced at the hearing, ~~or to an unspecified date~~, for reasons stated at the hearing, which may include the receipt of additional information offered by the applicant or others, ~~or~~ information and plans required of the applicant, deemed necessary by the Commission, or comments and recommendations of other boards and officials of the City of Northampton. In the event the applicant objects to a continuance or postponement, the hearing shall be closed and the Commission shall take action on such information as is available.

In addition, when there is snow on the ground and/or the ground is frozen the Commission may continue a hearing until the snow melts and/or the ground thaws if it determines that accurate wetland delineation is not possible otherwise. ~~If a date for continuation is not specified, the hearing shall reconvene within twenty-one (21) days after the submission of a specified piece of information or the occurrence of a specified action. If the date of said continued hearing is not announced at an earlier hearing, the new hearing date shall be published in a newspaper of general circulation in the City of Northampton five (5) working days prior to the continuation, at the expense of the applicant, and written notice shall be sent to any person who so requests in writing.~~

The Commission shall issue its permit, permit denial, or determination in writing within twenty-one (21) days of the close of the public hearing, unless an extension is authorized in writing or at the public hearing by the applicant.

The Commission shall combine its hearing under this ordinance with the hearing conducted under the Wetlands Protection Act, G.L. Ch. 131, §40, and Regulations, 310 CMR 10.00 in instances of concurrent jurisdiction.

#### **Section 24-9. Definitions**

{Amend Buffer definition and insert new Vernal Pool definition in alphabetical placement. Otherwise no change to section.}

Buffer: ~~The one hundred (100) foot boundary (forty feet for lands subject to flooding) around the resource area defined in Section 2. As defined under the Wetlands Protection Act, G.L. Ch. 131, §40 and Regulations thereunder, 310 CMR 10.00~~

Vernal Pools, for the purposes of this ordinance, a 'vernal pool' shall include vernal pools defined under the Wetlands Protection Act, G.L. Ch. 131, §40 and Regulations thereunder, 310 CMR 10.00, and any site which potentially could be vernal pool under that state definition. The resource area for vernal pools shall include the pool and a buffer extending laterally from the mean annual high-water line defining the depression but shall not include existing lawns, gardens, landscaped or developed areas.

Vernal Pool habitat is presumed to exist for any confined basin or depression not occurring in existing lawns, gardens, landscaped areas, or driveways which, at least in most years, holds water for a minimum of two continuous months during the spring and/or summer, contains at least 200 cubic feet of water at some time during most years, is free of adult predatory fish populations, and provides essential breeding and rearing habitat functions for amphibian, reptile, or other vernal pool community species, regardless of whether the site has been certified by the Massachusetts Division of Wildlife and Fisheries.

#### **Section 24-10. Performance Standards**

*{The performance standards are being significantly expanded to provide better and clearer notice to applicants of the standards, to reflect a recent court ruling (Fieldstone) that suggests that policy should be reflected in the ordinance, to reflect awareness of the sensitivity of vernal pools, and to reflect that infill development presents a smaller environmental footprint than new growth in outlying and greenfield areas.}*

1. All work shall be subject to inspection and require the approval of the Conservation Commission.
2. To encourage infill development, which is considered more sustainable under the principals of smart growth and generally has a smaller environmental footprint than development in outlying areas, in the Central Business, General Business, Neighborhood Business, General Industrial, Special Industrial, Planned Village, Medical, Urban Residential-B and Urban Residential-C zoning districts, outside of those portions of the Water Supply Protection overlay district which was zoned industrial as of 1/1/2006, the Conservation Commission shall waive any of the Section 24-10 performance standards that are over and above state law. The reduced setback requirements in subsection 5.A.2. below shall apply.
3. To encourage infill development, which generally has a smaller environmental footprint than development in outlying areas, in the Business Park zoning district for non-residential uses only the Conservation Commission shall waive any of the Section 24-10 performance standards that are over and above state law, except as provided in this paragraph. All removal, filling, dredging, or altering of any wetland shall be mitigated by the creation of artificial or replacement wetlands, with the replacement wetland built at one hundred and fifteen (115) percent of the size of the area which was disturbed.
4. Artificial or Replacement Wetlands: ~~All removal, filling, dredging, or altering of any wetland shall be mitigated by the creation of artificial or replacement wetlands, with the~~

~~replacement wetland built at one hundred and fifteen (115) percent of the size of the area which was disturbed.~~ If the applicant demonstrates to the Commission that the replacement wetland will provide wetland values equal or greater than the wetland values being lost, the Commission can allow replacement wetlands to be the same size as the disturbed area. ~~The applicant must specify the source of all wetland plan and soil that will be used in creating additional wetlands.~~ The history of wetland replication is mixed. Scientific reviews conclude that for the most part replications fail to reproduce the range of values — in quantity and quality — of the wetlands they ostensibly replace. In particular, difficulties in replicating proper hydrological conditions in a consistent and enduring fashion seem to be the source of the problem. Accordingly, the Conservation Commission strongly discourages any plan that requires replication. In those instances where replication is approved by the Commission the following conditions must be met:

- A. At minimum the replicated wetland must reproduce the values and functions of the original wetland as determined by the Conservation Commission. Site conditions permitting the Commission may require that additional values and functions be incorporated into the replication design. In particular, in circumstances where replacement of specific functions and values would require substantial amounts of time before being completely replicated (for example, those provided by large mature trees) the Commission may require additional compensation of area, functions, values, etc. beyond those required in other sections of this Ordinance.
- B. The area of replication must be at least twice as large as the area of the original resource that will be destroyed.
- C. In most instances the replication of wetland resource areas will result in the destruction of adjacent upland resource areas. In such instances replication or additional permanent preservation of new adjacent upland resources may be required.
- D. The top 12" of soil from the original wetland must be transplanted with soil structure – especially lamination and density profile – intact to the replication. This is intended to preserve plant, invertebrate, and planktonic communities of the wetland and inhibit the blossoming of invasive species.
- E. Any replication or restoration work that creates a resource on abutting properties shall require an easement from the abutting property owner covering the full extension of the resource on that property prior to commencement of the work.
- F. Standards for the replication shall be specified and verified in terms of functions, values, and actual performance. Technical and engineering specifications used for design and construction shall be considered approximate. Criteria for acceptance and approval shall be based solely on function and performance as specified in the Order of Conditions. In other words replications will be evaluated on what they are expected to do, not how closely actual construction matched the plan. For example, although elevations may be used for design and planning of a pond the standards shall be set in terms of volume and depth of water over the course of a year. In vernal pool replication the pool must be capable of sustaining full development of vernal pool species, regardless of design elevations or siting.
- G. Replications that do not properly perform the approved functions and values as specified in the order of conditions will not be deemed acceptable no matter how closely they adhere to approved engineered plans.
- H. The Commission may set other conditions on a project/site specific basis.

- I. For limited development projects, as defined in the wetlands protection act regulations, where it is not be practical to layout an element of the project without a wetlands replication, the Commission may waive some or all of the requirements of this sectionn.

5. Work within upland areas adjacent to wetland resource areas

*{Policy adopted by the Conservation Commission 10/23/2003 and largely reflects Commission policy and permit administration for more than a decade.}*

A growing body of research evidence suggests that even “no disturbance” areas reaching 100 feet from wetlands may be insufficient to protect many important wetland resource characteristics and values. Problems with nutrient runoff, erosion, siltation, loss of groundwater recharge, poor water quality, vegetation change and harm to wildlife habitat are greatly exacerbated by activities within 100 feet of wetlands, either immediately, as a consequence of construction, or over time, as a consequence of daily operation or existence of the activities. Thus, in general, work and activity within 100 feet of wetlands should be avoided and discouraged and reasonable alternatives pursued.

A. Accordingly, there is a rebutable presumption that lands within the first 100 feet of adjacent upland of a wetland resource area are important to the protection of the resource and are best left in an undisturbed and natural state and the City’s general policy is no encroachment within 50 feet of wetlands. Notwithstanding the above, the Commission may allow work within the 50-foot non-encroachment zone in response to a written request for a waiver of the 50’ non-encroachment zone, which shall include a written and plan view assessment as part of the application process as follows:

1. In areas that are down-gradient of the wetland resource and on areas that are already degraded by impervious surfaces from existing structures or pavement; and
2. In certain infill areas, development will generally be allowed closer to a wetland resource in accordance with the table below, including grading and native plantings and such other work where the proposed work includes mitigation measures that will improve the existing condition of the wetland resource or adjacent upland and is otherwise permissible under the state wetlands protection act; and

<u>Zoning District</u>	<u>Encroachment generally allowed</u>
<u>Northampton Industrial Park portion of General Industrial</u>	<u>10 feet from wetland resources</u>
<u>Central Business, General Business, Neighborhood Business, General Industrial, Special Industrial, Planned Village, Medical, Urban Residential-B and Urban Residential-C.</u>	<u>35 feet from wetland resources</u>
<u>All Water Supply Protection overlay areas zoned residential as of 1/1/2006, regardless of the underlying zoning, and all other areas</u>	<u>Only in conformance with the performance standards of this ordinance.</u>

3. For limited development projects, as defined in the wetlands protection act regulations, where it is not be practical to layout an element of the project beyond in accordance with this section (e.g. linear utilities).
- B. Certain areas 50 to 100 feet from a wetland resource may be suitable for temporary, limited or permanent disturbance as appropriate when the applicant can demonstrate to the Commission's satisfaction that the proposed work, activity or use will not affect wetland values singularly or cumulatively and, by means of a written and **plan view assessment**, that reasonable alternatives to the proposed work or activity do not exist, as follows:
  1. The Commission may allow the alteration of up to 20% of the area within the 50-100' buffer zone on a lot, or up to 2,000 square feet on a lot within a cluster subdivision. This is a total, cumulative allowance for all projects on a lot developed since the City first adopted a wetlands protection ordinance (8/17/1989); and
  - C-2. Proposed work within the 50-100' buffer zone must have no significant adverse impact on the wetland resource or the adjacent upland area and the applicant must provide evidence deemed sufficient by the Commission that that part of the buffer zone may be disturbed without harm to the values protected by the law.
  3. For limited development projects, as defined in the wetlands protection act regulations (e.g. a cross country pipeline that crosses wetlands).

6. Vernal Pool Habitat

{This new language is drawn from a policy adopted by the Conservation Commission 6/24/2004.}

The presumptive definition for vernal pools is **rebuttable** based on systematic field observations in the City of Northampton by the Northampton Conservation Commission showing that virtually all basins that possess the **defined** characteristics actually host breeding vernal **pool** species. Undoubtedly this is a particular consequence of Northampton's enduring woodlands and wetlands.

The presumption of essential vernal pool habitat value may be overcome with the presentation of credible evidence which in the judgment of the Conservation Commission demonstrates that the wetland does not provide, or cannot provide, vernal pool habitat functions. For the purposes of demonstrating that a ponding area is not a vernal pool and overcoming the presumption of vernal pool habitat the Commission will consider:

- A. Evidence that the ponding area does not hold water for at least two continuous months in most years. As a rule of thumb the term "most years" shall mean three out of five consecutive years.
- B. Evidence that vernal pool species do not breed or have not bred in the ponding area.
- C. Evidence that the ponding area could not be a viable breeding site for vernal pool species due to incompatible physical, chemical, biological, or other persistent conditions at the site in most years. Such evidence could include, without limitation, several months of pH



and dissolved oxygen measurements yielding values incompatible with amphibian or reptile breeding.

- D. Many of the indicators of vernal pool habitat are seasonal. For example, certain salamander egg clusters are only found between late March and late May. Wood frog chorusing only occurs between late March and May, and then only at night. Consequently, failure to find evidence of breeding must be tied explicitly to those periods during which the evidence is most likely to be available.
- E. Accordingly, in the case of challenges to the presumption of vernal pool habitat the Conservation Commission may require that the determination be postponed until the appropriate time period consistent with the evidence being presented. The Commission may also require its own site visits as necessary to confirm the evidence.

If a property owner grants permission by March 1<sup>st</sup> of any year the Northampton Office of Planning and Development or its agent will inspect and certify vernal pools (usually in the spring of each year). The City or its agent will then either certify eligible vernal pools with the Commonwealth of Massachusetts or provide a statement that an inspected potential vernal pool is not actually a certifiable vernal pool by the following September. A statement that a site is not a vernal pool shall be presumptive under this ordinance for three years but does not indicate that it is not otherwise a resource area. The fee for this work shall be made payable to the City or its agent, as applicable, and shall be the same fee as being charged for a Notice of Resource Area Delineation.